



9110-04-P

## **DEPARTMENT OF HOMELAND SECURITY**

### **Coast Guard**

### **33 CFR Part 165**

**[Docket Number USCG-2016-0799]**

**RIN 1625-AA87**

### **Safety and Security Zones; New York Marine Inspection and Captain of the Port Zone**

**AGENCY:** Coast Guard, DHS.

**ACTION:** Final rule.

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**SUMMARY:** The Coast Guard is modifying the safety and security zone surrounding the bridge between Liberty State Park and Ellis Island in order to increase navigational safety in New York Harbor. This modification authorizes certain vessels to transit underneath the bridge, reducing vessel congestion in the adjacent Anchorage Channel. All other persons and vessels continue to be prohibited from accessing the zone unless authorized by the Captain of the Port New York or a designated representative.

**DATES:** This rule is effective on [Insert date of publication in the Federal Register].

**ADDRESSES:** To view documents mentioned in this preamble as being available in the docket, go to <http://www.regulations.gov>, type USCG-2016-0799 in the "SEARCH" box and click "SEARCH." Click on Open Docket Folder on the line associated with this rule.

**FOR FURTHER INFORMATION CONTACT:** If you have questions on this rule, call or email MST1 Kristina Pundt, Waterways Management at U.S. Coast Guard Sector New York, telephone 718-354-4352, email Kristina.H.Pundt@uscg.mil.

**SUPPLEMENTARY INFORMATION:**

**I. Table of Abbreviations**

CFR	Code of Federal Regulations
DHS	Department of Homeland Security
FR	<b>Federal Register</b>
NPRM	Notice of proposed rulemaking
ANPRM	Advance notice of proposed rulemaking
§	Section
U.S.C.	United States Code
COTP	Captain of the Port
NPS	National Park Service

**II. Background Information and Regulatory History**

On November 27, 2002, the Coast Guard published a NPRM entitled, “Safety and Security Zones; New York Marine Inspection and Captain of the Port Zone” in the Federal Register (67 FR 70892). The NPRM proposed to establish a permanent safety and security zone encompassing all waters within 150 yards of Liberty Island, Ellis Island, and the bridge between Liberty State Park and Ellis Island. We received no comments on the proposed rule. No public hearing was requested and none was held. The current 150-yard permanent safety and security zone around the bridge between Liberty State Park and Ellis Island became effective in January 2003 as enacted by a final rule entitled, “Safety and Security Zones; New York Marine Inspection Zone and Captain of the Port Zone” published in the Federal Register (68 FR 2886, January 22, 2003).

On May 6, 2008, the Coast Guard published a NPRM entitled, “Safety and Security Zones; New York Marine Inspection Zone and Captain of the Port” in the

Federal Register (73 FR 24889). The NPRM proposed to modify several aspects of the permanent safety and security zone regulations within the New York Captain of the Port Zone. We received 15 comments regarding the proposed rule. A public meeting was requested to discuss the proposed expansion of the Liberty and Ellis Island safety and security zone to include all waters within 400 yards of these two islands and the bridge between Liberty State Park and Ellis Island. On February 12, 2009, the Coast Guard published a final rule entitled, “Safety and Security Zones New York Marine Inspection Zone and Captain of the Port Zone” in the Federal Register (74 FR 7184). However, based on the comments received, the Coast Guard did not expand the Liberty and Ellis Island safety and security zone. As a result, a public meeting was unnecessary and the zone remained 150 yards.

On November 3, 2016, the Coast Guard published an ANPRM entitled, “Safety and Security Zones; New York Marine Inspection and Captain of the Port Zone” in the Federal Register (81 FR 76545). The ANPRM solicited public comments on a potential rulemaking to modify the existing safety and security zone around the bridge between Liberty State Park and Ellis Island. In response to public requests, the comment period was reopened for an additional 60 day period on February 14, 2017 (82 FR 10558). We received 125 comments regarding the advance notice of proposed rulemaking. Out of the 125 comments received, 123 comments were in support of modifying the existing safety and security zone around the bridge between Liberty State Park and Ellis Island, almost all of which emphasized improving navigation safety. The sole comment opposing modification of the zone, provided by the National Park Service, expressed security concerns regarding Ellis and Liberty Islands due to their historical symbolism. The

singular neutral comment received was unclear as to the commenter's view on the proposed safety and security zone modification. The comment addressed the federal job hiring process and stated that all security zones should be eliminated, both of which are outside the purview of this rulemaking.

In response to the comments received on the above mentioned ANPRM, on April 20, 2018, the Coast Guard published a NPRM entitled, "Safety and Security Zones; New York Marine Inspection and Captain of the Port Zone" in the Federal Register (83 FR 17513). The NPRM solicited public comments on our proposed regulatory action related to the safety and security zone modification. During the comment period that ended May 21, 2018, we received 40 comments.

Under 5 U.S.C. 553(d)(1), the Coast Guard finds that an exception exists for making this rule effective less than 30 days after publication in the **Federal Register**. This safety and security zone modification allows greater access to a previously restricted area. Although the current regulation allows vessels to transit under the Ellis Island Bridge with COTP permission, this modification grants standing COTP approval for certain vessels to transit underneath the bridge during specific time periods. Thus, this modification lessens the regulatory burden on these vessels by allowing transit through the safety and security zone without needing to seek prior COTP permission. As this rule relieves a restriction, the Coast Guard finds that delaying the effective date of this rule is unnecessary.

### **III. Legal Authority and Need for Rule**

The Coast Guard is issuing this rule under authority in 33 U.S.C. 1231. The COTP New York has determined that the vessel congestion in the Anchorage Channel

presents a hazard to mariners within New York Harbor. The purpose of this safety and security zone modification is to increase navigational safety within New York Harbor. By permitting greater access for human powered vessels to transit underneath the bridge between Ellis Island and Liberty State Park, the vessel congestion in the adjacent Anchorage Channel will be reduced.

#### **IV. Discussion of Comments, Changes, and the Rule**

As noted above, we received 40 comments on our NPRM published April 20, 2018. Of the 40 comments received, 39 were in support of modifying the existing safety and security zone to allow transit underneath the Ellis Island Bridge, stating navigational safety will improve. The sole neutral comment addressed the United States' trade relations with China and is outside the purview of this rulemaking.

We received 25 comments recommending the 16 foot vessel length either be eliminated or increased. 10 comments noted that many kayaks are greater than 16 feet in length, with some of these comments specifically noting that many sea kayaks are 18 feet or longer. 4 comments discussed that many canoes or row gigs navigating this area are longer than 16 feet, ranging between 25 to 35 feet. We received other comments stating human powered vessels in New York Harbor can exceed 45 feet. Based on these comments, we are changing the regulatory text of the NPRM to reflect that human powered vessels with a length equal to or less than 25 feet may transit the zone. Increasing the permissible length to equal to or less than 25 feet balances the need for ensuring navigational safety and providing adequate security for Ellis and Liberty Islands. In addition, mariners with human powered vessels greater than 25 feet in length

may request COTP permission to transit the zone and these requests will be evaluated on a case-by-case basis.

We received 15 comments regarding access to the safety and security zone during weekdays and throughout the year. These comments noted that the congestion in the Anchorage Channel poses a navigational safety concern to human powered vessels regardless of the day of the week or season of the year. Commenters further stated that many human powered vessel trips are based upon favorable tides and weather.

Due to agency resource constraints, pre-approved access to the zone cannot be extended to encompass all weekdays without compromising the required security posture necessary to protect these national symbols. Similarly, extending pre-approved access beyond the summer boating season poses an unacceptable risk due to the lack of sufficient resources to adequately maintain the required security presence such access demands. Vessel congestion in New York Harbor is greatest on weekend days during the summer months. Limiting pre-approval to certain vessels transiting the zone on weekends during the peak summer boating season, will help ensure adequate security for Ellis and Liberty Islands and well as increase navigational safety. Mariners may request COTP authorization to access the zone on weekdays and throughout the year and each request will be evaluated on a case-by-case basis.

We received 11 comments requesting an expansion of the time of day vessels are permitted to access the zone. Commenters requested vessels be permitted to transit from sunrise to sunset, one hour before sunrise and one hour after sunset, and 24 hour access to the zone. Commenters noted that many human powered vessel trips are based upon favorable tides, which do not necessary align with the times specified in the NRPM. The

Coast Guard believes that security concerns warrant the need to limit the duration of time that transit is permissible. Visibility is greatly reduced outside of the times specified in the NPRM. Where there is reduced visibility the security threat is enhanced and necessitates limiting the pre-approved access of the zone during daylight hours. Also, due to Coast Guard and NPS resource constraints, adequate security is unable to be provided at all times. The most congested time of day in New York harbor is during the daytime. Providing pre-approved COTP access to the zone during the busiest time of day allows the Coast Guard to balance the navigational safety concerns faced by human powered vessel users with the security concerns of these historical landmarks.

We received 3 comments recommending there be a way to contact the agencies through use of a VHF radio, in addition to the phone number contact. The Coast Guard is changing the regulatory text of the NPRM to add VHF Channel 13 as an additional notification method.

Additional changes to the regulatory text between the NPRM and the Final Rule are incorporated below to improve understanding of the modification imposed by this rule. Based on the comments addressing concerns with the restriction on vessel length, weekday transit, and duration of time that transit is permissible, 33 CFR 165.169(b) provides that any person or vessel may request COTP authorization to access the zone throughout the year and each request will be evaluated on a case-by-case basis. The text in the NPRM referred to the zone as a “security zone.” Per 33 CFR 165.169, it remains both a safety and security zone. Both the preamble and the regulatory text now reflect this fact.

This rule modifies an existing safety and security zone. The modification allows certain vessels to transit underneath the Ellis Island Bridge on weekends and Federally Observed Holidays on a Friday or Monday, beginning on Memorial Day Weekend through October 1, between one hour after sunrise and one hour before sunset. Vessels making this transit a) must be able to safely navigate underneath the bridge, b) be human powered vessels with a length equal to or less than 25 feet and c) meet the horizontal and vertical navigational bridge clearances. This rule allows for pre-approved COTP permission to transit the zone when meeting the conditions listed in the regulatory text. In accordance with 33 CFR 165.169(b), any person or vessel may still request COTP permission to access the Ellis Island Bridge security zone at any time and each request will be considered on a case-by-case basis. The modified regulatory text is at the end of this document.

## **V. Regulatory Analyses**

We developed this rule after considering numerous statutes and Executive orders related to rulemaking. Below we summarize our analyses based on a number of these statutes and Executive orders, and we discuss First Amendment rights of protestors.

### **A. Regulatory Planning and Review**

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits. Executive Order 13771 directs agencies to control regulatory costs through a budgeting process. This rule has not been designated a “significant regulatory action,” under Executive Order 12866. Accordingly, this rule has not been reviewed by the Office of Management and Budget (OMB), and pursuant to



OMB guidance it is exempt from the requirements of Executive Order 13771.

This regulatory action determination is based on the modification allowing increased access to a previously restricted area. While the current regulation allows vessels to transit under the Ellis Island Bridge with COTP authorization, this modification grants standing COTP approval for certain vessels to transit underneath the bridge during specific time periods. Thus, this modification lessens the regulatory burden on these vessels by allowing transit through the security zone without needing to seek prior COTP permission. Moreover, the Coast Guard will make the boating public aware of this modification through publication in the Local Notice to Mariners, enhancing public notice of the reduction of the regulatory burden on certain vessels.

*B. Impact on Small Entities*

The Regulatory Flexibility Act of 1980, 5 U.S.C. 601–612, as amended, requires Federal agencies to consider the potential impact of regulations on small entities during rulemaking. The term “small entities” comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000. The Coast Guard received no comments from the Small Business Administration on this rulemaking. The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities.

While some owners or operators of vessels intending to transit the security zone may be small entities, for the reasons stated in section V.A. above, this rule will not have a significant economic impact on any vessel owner or operator.

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act

of 1996 (Public Law 104-121), we want to assist small entities in understanding this rule. If the rule will affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please contact the person listed in the FOR FURTHER INFORMATION CONTACT section.

Small businesses may send comments on the actions of Federal employees who enforce, or otherwise determine compliance with, Federal regulations to the Small Business and Agriculture Regulatory Enforcement Ombudsman and the Regional Small Business Regulatory Fairness Boards. The Ombudsman evaluates these actions annually and rates each agency's responsiveness to small business. If you wish to comment on actions by employees of the Coast Guard, call 1-888-REG-FAIR (1-888-734-3247). The Coast Guard will not retaliate against small entities that question or complain about this rule or any policy or action of the Coast Guard.

#### C. Collection of Information

This rule will not call for a new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3520).

#### D. Federalism and Indian Tribal Governments

A rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. We have analyzed this rule under that Order and have determined that it is consistent with the fundamental federalism principles and preemption requirements described in Executive Order 13132.

Also, this rule does not have tribal implications under Executive Order 13175,

Consultation and Coordination with Indian Tribal Governments, because it does not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes. If you believe this rule has implications for federalism or Indian tribes, please contact the person listed in the FOR FURTHER INFORMATION CONTACT section.

*E. Unfunded Mandates Reform Act*

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531-1538) requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, or tribal government, in the aggregate, or by the private sector of \$100,000,000 (adjusted for inflation) or more in any one year. Though this rule will not result in such an expenditure, we do discuss the effects of this rule elsewhere in this preamble.

*F. Environment*

We have analyzed this rule under Department of Homeland Security Directive 023-01 and Commandant Instruction M16475.1D, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969(42 U.S.C. 4321-4370f), and have determined that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This rule modifies a security zone surrounding the bridge between Liberty State Park and Ellis Island in order to permit greater vessel access. It is categorically excluded from further review under paragraph L60(b) of Appendix A, Table 1 of DHS Instruction Manual 023-01-001-01, Rev. 01. A Record of Environmental Consideration supporting this

determination is available in the docket where indicated under ADDRESSES.

*G. Protest Activities*

The Coast Guard respects the First Amendment rights of protesters. Protesters are asked to contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section to coordinate protest activities so that your message can be received without jeopardizing the safety or security of people, places, or vessels.

**List of Subjects in 33 CFR Part 165**

Harbors, Marine safety, Navigation (water), Reporting and recordkeeping requirements, Security measures, Waterways.

For the reasons discussed in the preamble, the Coast Guard amends 33 CFR part 165 as follows:

**PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS.**

1. The authority citation for part 165 continues to read as follows:

**Authority:** 33 U.S.C. 1231; 50 U.S.C. 191; 33 CFR 1.05–1, 6.04–1, 6.04–6, and 160.5; Department of Homeland Security Delegation No. 0170.1

2. In § 165.169, revise paragraph (a)(4) to read as follows:

**§ 165.169 Safety and Security Zones: New York Marine Inspection Zone and Captain of the Port Zone.**

(a) \* \* \*

(4) *Liberty and Ellis Islands*—(i) *Location*. All waters within 150 yards of Liberty Island and Ellis Island, and the Ellis Island Bridge.

(ii) *Ellis Island Bridge*. In addition to any person or vessel authorized pursuant to paragraph (b) of this section, vessels may transit underneath the Ellis Island Bridge subject to the following conditions:

(A) Dates/Times: On weekends only, to include Federally Observed Holidays on a Friday or Monday, from Memorial Day Weekend through October 1 each year, between one hour after sunrise and one hour before sunset.

(B) Vessel types: Human powered vessels equal to or less than twenty five feet. Human powered vessels must be able to safely navigate under the bridge.

(C) Notification: Human powered vessels desiring to transit shall contact the United States Park Police Command Center at 212-363-3260 or VHF CH 13 regarding intentions of passage prior to entering the safety and security zone and transiting under the Ellis Island Bridge.

(D) Route: Transits through the safety and security zone and under the bridge shall occur only at the designated route marked with lights and signage.

(E) Passage: Vessels transiting under the Ellis Island Bridge shall make expeditious passage and not stop or loiter within the safety and security zone.

(iii) *Enforcement period.* The safety and security zone described in this subsection is effective at all times. Although certain vessels have permission to enter the safety and security zone to transit under the Ellis Island Bridge subject to the conditions outlined in paragraphs (a)(4)(ii)(A)-(E) of this section, the safety and security zone is in effect permanently and can be enforced at any time. When deemed necessary the COTP may rescind the permission granted in paragraphs (a)(4)(ii)(A)-(E) of this section for any period of time.

\* \* \* \* \*

Dated: June 4, 2018

M. H. Day  
CAPTAIN, U.S. Coast Guard,  
Captain of the Port New York.  
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